[HIGH COURT OF AUSTRALIA.]

LONG . . . . . APPELLANT;
INFORMANT,

AND

CHUBBS AUSTRALIAN COMPANY LIMITED RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

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SYDNEY, 1935, *Mar.* 20, 22.

Rich, Dixon, Evatt and McTiernan JJ.

Industrial Arbitration—Award—Provision that minors shall not be engaged in the industry except under contracts of apprenticeship framed in conformity with the award—Breach—Minor, not a member of any industrial union of employees—Validity of provision—Jurisdiction of Commonwealth Court of Conciliation and Arbitration—Enforceability—Rights of parties to the award.

The respondent company was charged with having committed a breach of an award of the Commonwealth Court of Conciliation and Arbitration which provided, *inter alia*, that minors should not be engaged in certain specified occupations except under contracts of apprenticeship framed in accordance with the award. Both the respondent company and the union of employees by which the information was laid, were parties to the award. The minor in question was not a member of the union. The information was dismissed on the ground that the award did not apply to the non-unionist employees of tke company.

Held that the information was wrongly dismissed because, although non-unionist minors were affected as an incident of its operation, the provision in the award relating to the engagement of minors in the industry was within the ambit of the industrial dispute determined by that award, and was, therefore, *intra vires*; it created rights and duties enforceable and performable by the parties to that award.

Amalgamated Engineering Union v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.*, (1928) 41 C.L.R. 402, and *Amalgamated Clothing and Allied Trades Union of Australia* v. *D. E. Arnall & Sons*; *In re American Dry Cleaning Co.*, (1929) 43 C.L.R. 29, discussed.

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APPEAL, by way of case stated, from a Court of Petty Sessions of New South Wales.

In an information laid by William Christopher Long, a member of the Commonwealth Council of the Amalgamated Engineering Union (Australian Section), it was alleged that Chubbs Australian Co. Ltd., an organization bound by an award made on 25th March 1930 by the Commonwealth Court of Conciliation and Arbitration under the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1930, and still in force, wherein the union and others were claimants and the defendant and others were respondents, did on 21st May 1934 commit a breach of the award by failing to observe it by engaging at its place of business at Sydney, a minor within the meaning of the award in the occupation of fitting and turning, otherwise than under a contract of apprenticeship framed in conformity with the award.

It was admitted upon the hearing before the magistrate that: (*a*) Long was a member of the Commonwealth Council of the Amalgamated Engineering Union, an organization of employees duly registered under the provisions of the *Commonwealth Conciliation and Arbitration Act*, and was duly authorized to sue on behalf of the union; (*b*) that the defendant company was at all material times a respondent to the award of the Commonwealth Court of Conciliation and Arbitration made on 25th March 1930, which award was still in force; (*c*) that the union was also a party to and bound by the award; (*d*) that the defendant company on 21st May 1934 employed one Edward Stokes, a minor, eighteen years of age, in the occupation of fitting and turning, otherwise than under a contract of apprenticeship framed in accordance with the award; (*e*) that the defendant company on 21st May 1934 employed members of the union, and in respect of those members was bound by the provisions of the award; and (*f*) that Stokes was not a member of the union.

Without admitting the relevancy thereof, it was admitted: (*g*) that the defendant company was at all relevant times registered as a trainee employer under the Engineers, &c. (State) Apprenticeship Award, published 3rd November 1933, and made by the Engineers, &c. (State) Apprenticeship Council pursuant to the provisions of the

Industrial Arbitration Act 1912 (N.S.W.), as amended by the *Industrial Arbitration (Amendment) Act* 1926 (N.S.W.), and by the *Industrial Arbitration (Amendment) Act* 1932 (N.S.W.); and (*h*) that that Council purporting to act under the State award approved of the employment of Stokes as a trainee apprentice at the trade of fitting, and fixed the time to be served by Stokes as a trainee at five years calculated from 2nd August 1933.

The relevant clause of the award of the Commonwealth Court of Conciliation and Arbitration, made 25th March 1930, was, so far as material, as follows :—" 14. Apprenticeship. (1) . . . minors shall not be engaged in the following occupations except under contracts of apprenticeship framed in conformity with this award . . . (*a*) . . . (iii.) fitting and turning . . . (2) The proportion of apprentices who may be taken by any employer shall be as follows :— . . . one apprentice for every three or fraction of three tradesmen . . . (4) The periods of apprenticeship shall be as follows :—For the trades included in sub-clause (*a*) . . . of this clause ; if the apprentice when articled is under the age of 17, five years ; if over the age of 17, four or five years, at the option of the contracting parties . . . (6) Minors may be taken on probation for three months, and if apprenticed, such three months shall count as part of their period of apprenticeship. (7) Wages.—In all contracts of apprenticeship hereafter made, the minimum rate of wages shall . . . be as follows :—Five year term—1st year, 18s. ; 2nd year, 24s. ; 3rd year, 38s. ; 4th year, 57s. 6d. ; 5th year, 72s. 6d. ; Four year term—when the apprentice enters or has entered his apprenticeship after reaching the age of 17 years :—1st year, 20s. ; 2nd year, 36s. ; 3rd year, 57s. 6d. ; 4th year, 72s. 6d. Where an apprentice is under the age of 21 on the expiry of his apprenticeship he shall be paid four-fifths of the tradesman's time wage until reaching 21 . . . (10) The ordinary hours of employment of apprentices shall be the same in each workshop as those of journeymen. (11) No apprentice under the age of 18 years shall be liable to work overtime unless he so desires. (12) No apprentice shall work under any system of piece-work or payment by results. (13) Any apprentice who cannot complete his full time of apprenticeship before reaching his twenty-second birthday

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may by agreement with his master serve as an apprentice until he reaches the age of 23 years. (14) Every contract of apprenticeship hereafter made shall contain :—i. The names of the parties. ii. The date of birth of the apprentice. iii. A statement of the trade or trades to which the apprentice is to be bound and which he is to be taught in the employer's workshop during the course of and for the purposes of his apprenticeship. iv. The date at which the period of apprenticeship is to commence or from which it is to be calculated. v. A covenant by the employer to teach the specified trade and by the employee to obey the lawful commands of the master. (15) No employer shall either directly or indirectly or by any pretence or device receive from any other person or require or permit any person to pay or give any consideration in the nature of a premium or bonus for the taking or binding of any probationer or apprentice. . . . (21) In any State in which an Apprenticeship Commission or other body under statutory authority has issued or may hereafter issue any regulations relating to apprentices, such regulations, notwithstanding anything contained in this award shall (except as to sub-clauses 1-3, 5-13, 15 and 19 of this clause) operate in such State."

The magistrate dismissed the information. He found that the terms of the award did not apply to non-unionist employees of the defendant company.

From this decision the informant appealed to the High Court by way of case stated. The question for the opinion of the Court was: Was the magistrate's determination erroneous in point of law ?

The appeal came on for hearing in November 1934, and was adjourned so that the parties might ascertain the most convenient way of bringing the matter before the Court for the purpose of dealing with the questions involved. On 20th March 1935 the appeal again came on for hearing.

E. M. Mitchell K.C. (with him *De Baun* and *Gee*), for the appellant. It is agreed between the parties that as a matter of construction the provision in the award relating to minors extends to all minors irrespective of whether or not they are members of an industrial union. The question now before the Court involves a reconsideration

of the decision in *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (1) and in *Amalgamated Clothing and Allied Trades Union of Australia* v. *D. E. Arnall & Sons*; *In re American Dry Cleaning Co.* (2). The provision that minors shall not be engaged in certain specified occupations except under contracts of apprenticeship framed in conformity with the award is a valid provision, notwithstanding that it is applicable equally to non-unionists as to unionists. The object of the provision is, at least, twofold: (*a*) to prevent the degeneration of the occupations specified therein into unskilled occupations, and (*b*) to ensure that the employment of juvenile labour shall not adversely affect the standard of wage for work of a skilled description. The provision also secures for unionist apprentices equality of conditions with non-unionist apprentices. The question of the employment "of persons of any particular sex or age, being or not being members of any organization or body" is an "industrial matter," and, therefore, may be the subject of an "industrial dispute" within the meaning of those expressions as defined in sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904-1930. These statutory definitions and provisions are unambiguous and definite, and, it is submitted, do not harmonize with the view expressed in *Alderdice's Case* (3). The views expressed by *Higgins* J. in *Alderdice's Case* (4), and by *Isaacs* J. in *Arnall's Case* (5) are correct, and should be adopted. Sec. 25c of the Act contemplates the formulation of schemes of apprenticeship. Sec. 25A also has a material bearing upon the matter. There is not, in those sections, nor in the Act as a whole, any indication of an intention on the part of the Legislature to restrict the operations of the Court to apprentices who are unionists, or to apprentices who are not unionists. It is important that entry into the various occupations should be controlled and regulated so as to prevent the employment therein of unskilled persons. Persons cannot become skilled unless they are taught. This is best achieved by juveniles during apprenticeship (*Encyclopædia Britannica*, 11th ed. (1910), vol. II., pp. 145, 147). The provision confers benefits upon adult employees; it tends to ensure security of employment. The

(1) (1928) 41 C.L.R. 402.
(2) (1929) 43 C.L.R. 29.
(3) (1928) 41 C.L.R., at p. 435.
(4) (1928) 41 C.L.R., at pp. 428, 429.
(5) (1929) 43 C.L.R., at pp. 46, 47.

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formulation of apprenticeship articles covering conditions of employment and rates of wage is a matter in which industrial unions have a real interest, and has been so regarded by the Court (*The Boot Case* (1); *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (2); *In re Process Engravers (Cumberland and Newcastle) Apprenticeship Council* (3)). [He was stopped.]

O'Mara, for the respondent. The provision of the award now under consideration is *ultra vires*. The *Commonwealth Conciliation and Arbitration Act* does not confer power upon the Commonwealth Court of Conciliation and Arbitration "to make awards prescribing the duties of employers to employees who are neither parties to the industrial dispute before the Court nor members of nor represented by an organization which is a party to that dispute" (*Alderdice's Case* (4); *Arnall's Case* (5)). The adoption by the Court of the argument put forward on behalf of the appellant would involve the overruling of *Alderdice's Case* (6), and also of *Arnall's Case* (5). Those cases should not be reconsidered at this stage. The argument addressed to the Court on behalf of the appellant is similar to the argument put to the Court in *Alderdice's Case* (6). An application to re-open the question decided in that case was refused by the Court in *Arnall's Case* (7).

[DIXON J. referred to *The Tramways Case* [*No.* 1] (8).]

The matter should not be further litigated. It should be regarded as having been concluded, particularly as the judgments sought to be overruled have for a long time been acted upon in good faith by the community.

Cur. adv. vult.

Mar 22.

THE COURT delivered the following written judgment:—

This appeal is brought under sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1933 directly to this Court from a decision of a Court of Petty Sessions exercising Federal jurisdiction.

(1) (1910) 4 C.A.R. 1, at p. 15.
(2) (1921) 15 C.A.R. 297, at pp. 325 et seqq.
(3) (1933) 32 A.R. (N.S.W.) 90.
(4) (1928) 41 C.L.R., at pp. 411, 435.
(5) (1929) 43 C.L.R. 29.
(6) (1928) 41 C.L.R. 402.
(7) (1929) 43 C.L.R., at pp. 34, 35.
(8) (1914) 18 C.L.R. 54, at pp. 57, 58.

By the decision appealed from an information under sec. 44 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 was dismissed. The information, which was laid by an officer of an employee's organization bound by an award of the Commonwealth Court of Conciliation and Arbitration, alleged that the respondent, an employer, committed a breach of the award. The breach charged was that the respondent engaged a minor in an occupation, specified in the clause in the award relating to apprenticeship, otherwise than under a contract of apprenticeship framed in conformity with the award. The clause in question provides that minors shall not be engaged in given occupations except under contracts of apprenticeship framed in conformity with the award. It fixes the proportion of apprentices to tradesmen which an employer may take. It provides for the period of apprenticeship, for the rates of wages to be paid to apprentices in successive years of service, for hours and overtime and for some less important conditions. Some of the contents of the contract of apprenticeship are prescribed, and certain things are forbidden. For instance, the employer may not put the apprentice to piece-work; he may not exact a premium. There are provisions, too, relating to the teaching of apprentices.

The respondent admittedly did engage a minor in a manner contrary to the clause. But its defence to the information was that the clause is invalid because it was beyond the jurisdiction of the Commonwealth Court of Conciliation and Arbitration to include it in the award. And upon this ground the information was dismissed. The contention is not based upon the character of the industrial dispute; it is not suggested that the clause travelled outside the limits of the claims from which that dispute arose. On the contrary, it inferentially appears that in fact the dispute included the subject matter or matters with which the apprenticeship clause deals. The contention is that because the clause relates to apprentices who are not members of the employee's organization, therefore, dispute or no dispute, it is beyond the jurisdiction of the Court of Conciliation and Arbitration to award it.

Now the *Commonwealth Conciliation and Arbitration Act* 1904-1930 appears specifically to contemplate the very thing which is complained of as outside the scope of the Court's powers. The

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definition of "industrial matters" includes "the employment . . . or non-employment . . . of persons of any particular age . . . or being or not being members of any organization association or body." "Industrial dispute" is defined to mean an industrial dispute extending beyond the limits of any one State, and to include any dispute as to industrial matters. Sec. 25c requires the Court to take into consideration any scheme of apprenticeship provided by or under State law when the Court determines any industrial dispute in which the rates of pay or conditions of employment applying to apprentices in any industry are in question. The employment of apprentices in industry, their relation to tradesmen, and the use of apprentices by employers to the prejudice, real or supposed, of other labour has, as is well known, been a common source of industrial conflict. The reason for this lies in the fact that tradesmen have a material interest which is very real in the conditions of juvenile labour and of juvenile training in the industry in which they work. The effect which conditions of that description may produce upon the working conditions of adults in the industry is direct and substantial. We think that this circumstance removes the objection upon which the respondent relies. Apprentices are, of course, recruited from boys, and more often than not before they have become members of an industrial organization. The object of the clause is not to confer advantages on apprentices, although, no doubt, in framing it their interests have not been forgotten. Its object is to benefit the members of the organization by preventing what were considered abuses from which consequential disadvantages to them would arise. The only rights given by the clause are given to the organization and to its members. The only duties imposed are imposed upon employers from whom the organization demanded that they should deal with all apprentices in a manner similar or analogous to that prescribed by the award. The rights and duties, therefore, created by this clause are, we think, confined to the disputants. It is true that when, in compliance with the award, an employer and an apprentice enter into a contract of apprenticeship, mutual rights and duties will arise between them. But these rights and duties will rest entirely in contract. They will not spring from the award. The case of apprenticeship appears to

us to resemble in principle that of preference to unionists of which in *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (1), *Gavan Duffy* J., as he then was, and *Starke* J. said that the power of the Court to grant it "is a power to prescribe the rights and duties of the actual disputants as between themselves, though it may also be detrimental to the interests of others." The only difference is that the regulation of apprenticeship is, or may be thought to be, beneficial to the others, the apprentices. The ground of attack upon it in this case alleges that it confers benefits upon non-disputants to which they would obtain a legal right under the award.

We think the passage we have quoted impliedly concedes that, where the material interests of one set of disputants are directly affected by the relations which the other set habitually enters into with strangers to the dispute, an award may regulate their entry into these relations, at any rate if it assumes to do no more than confer rights and impose duties upon the disputants and, in the case of organizations, their present and future members.

In view of the course of the argument, it appears desirable to repeat the observations upon the decision made by *Rich* and *Dixon* JJ. in *Amalgamated Clothing and Allied Trades Union* v. *D. E. Arnall & Sons*; *In re American Dry Cleaning Co.* (2):—"In that case, however, the Court was composed of six Justices and three of them, *Isaacs* J., *Higgins* J. and *Powers* J., although giving the same answer to the question asked by the special case did so for other reasons, and two of the Justices, *Isaacs* J. and *Higgins* J., expressly dissented from the reasons of *Knox* C.J., *Gavan Duffy* J. and *Starke* J. In these circumstances these reasons cannot be said to be the *ratio decidendi* of the order made by the Court."

Arnall's Case (3) itself is somewhat nearer to the present because it concerned improvers. But we do not think that we are called upon to consider that decision, because we think that in any view apprenticeship is a matter with which the Court of Conciliation and Arbitration may deal. It is desirable, however, to point out that the decision of that case is by three Justices in a Court of six.

(1) (1928) 41 C.L.R., at p. 435. (2) (1929) 43 C.L.R., at pp. 51, 52.
(3) (1929) 43 C.L.R. 29.

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For *Isaacs* J., as he then was, dissented and *Rich* and *Dixon* JJ. considered it futile to go into the question in view of the opinion already expressed in *Alderdice's Case* (1) by *Knox* C.J., *Gavan Duffy* J. and *Starke* J. which, as they adhered to it, would in any event prevail in *Arnall's Case* (2). Upon the question whether in the Full Court such a decision has more than a persuasive authority we refer to the judgments of *Rich* and *Dixon* JJ. in *Tasmania* v. *Victoria* (3).

We have not thought it necessary to discuss every term of the clause impugned, because the respondent disobeyed the clause in its entirety, and no particular provision which the clause contains has been made the subject of a separate or independent attack.

We think the appeal should be allowed with costs, and the information remitted to the magistrate to be dealt with according to law.

Appeal allowed with costs. Order appealed from set aside. Information remitted to the magistrate.

Solicitors for the appellant, *Sullivan Bros.*

Solicitors for the respondent, *Salwey & Primrose.*

J. B.

(1) (1928) 41 C.L.R. 402.
(2) (1929) 43 C.L.R. 29.
(3) (1935) 52 C.L.R. 157.